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Comptroller General  
of the United States

United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** East Bay Elevator Company, Inc.—Costs

**File:** B-286315.2

**Date:** July 26, 2001

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Laurence Schor, Esq., and Susan L. Schor, Esq., McManus, Schor, Asmar & Darden, for the protester.

Thomas Y. Hawkins, Esq., General Services Administration, for the agency.

Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for reimbursement of protest costs based on agency delay in implementing promised corrective action is denied where the issues raised by the protester were not clearly meritorious, and the agency determined to take corrective action because of its concern with a matter that was not raised in the protest.

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### DECISION

East Bay Elevator Company, Inc. requests that we recommend that it recover the costs, including attorneys' fees, incurred in connection with its protest challenging the award of a contract for elevator maintenance services to Star Elevator, Inc. under request for proposals (RFP) No. GS-09P-00-KSC-0086, issued by the General Services Administration (GSA).

We deny the request.

On September 20, 2000, East Bay filed its underlying protest alleging that the award to Star was improper because GSA had failed to conduct meaningful discussions and had erroneously determined that Star satisfied a specialized experience requirement contained in the RFP. During the development of the protest, GSA's counsel advised our Office in a telephone conference, which included protester's counsel, that GSA intended to take corrective action because the source selection plan did not contain objectively stated standards for evaluating the technical proposals. Subsequently, prior to the due date for the agency report, GSA advised our Office that it "became aware of a potential defect in the evaluation of proposals," and that while it "disputes the grounds for protest raised by the protester, [GSA] has determined that it shall

re-evaluate the offers on account of the more recently discovered issue.” Agency Corrective Action Letter, October 18, 2000, at 1. Thereupon, our Office dismissed the protest because GSA’s corrective action rendered the protest academic. By letter dated May 11, 2001, GSA advised East Bay that it had completed its reevaluation and again determined to award to Star.<sup>1</sup> East Bay now seeks reimbursement of its protest costs on the basis that GSA unduly delayed implementing the promised corrective action.

When an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protests. 4 C.F.R. § 21.8(e) (2001). Under this provision, we will recommend recovery of protest costs where, based on the circumstances of the cases, we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Millar Elevator Service Co.—Costs, B-281334.3, Aug. 23, 1999, 99-2 CPD ¶ 46 at 2. We have recognized that the reimbursement of protest costs may be appropriate where an agency does not timely implement promised corrective action that precipitated the dismissal, even where the original determination to take corrective action may otherwise have been sufficiently prompt that payment of protest costs would not have been warranted. See Louisiana Clearwater, Inc.—Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. However, the underlying requirement that the protester have filed a clearly meritorious protest remains a predicate for reimbursement in these circumstances. Id.; Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5.

Here, the corrective action was taken as a result of the agency’s concern about the sufficiency of its source selection plan. In particular, while preparing its agency report, GSA concluded that “the absence of objectively stated standards [resulted in] technical evaluation scores that were difficult to correlate to the scoring methodology established in the plan.” Agency Cost Request Report at 2. In advising that it was taking corrective action, GSA specifically disputed the protest issue raised by East Bay, and the protester had not raised the issue which caused the agency to take the corrective action. In its comments on the agency’s cost request report, East Bay essentially argues that GSA’s delay in implementing the promised corrective action is sufficient by itself to warrant reimbursement. As to the merits of its underlying protest, East Bay merely points out that there is no indication that GSA would have taken corrective action without East Bay having filed its protest, conceding that the merits of the protest had not been established when the action was taken. Protester’s Comments at 1. East Bay’s position is untenable, as it would effectively eliminate the requirement for a clearly meritorious protest, which

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<sup>1</sup> East Bay has again protested this award raising virtually the identical grounds that it raised in the original protest. Our Office will separately issue a decision addressing the merits of these issues.

is an unconditional prerequisite to a recommendation for the recovery of costs.  
Millar Elevator Serv. Co.--Costs, supra, at 2-4.

The request for a recommendation that protest costs be reimbursed is denied.

Anthony H. Gamboa  
General Counsel